Supreme Court, U.S.
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OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

GEORGE C. S. LIU and GAIL K. LIU,

Petitioners,

v.

KENNETH P. SILVERMAN, ESQ., Chapter 7 Trustee of the Estate of George C. S. Liu and Gail K. Liu,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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3588

QUESTIONS PRESENTED

1. Is an order from a Bankruptcy Judge that approves a settlement which totally ignores the Petitioners' resulting economic hardship and the vivid fraudulent and conspiratorial conduct of attorneys and a real estate broker to be upheld if it violates the Petitioners' due process right to a fair trial?

2. As a case that is of such imperative public importance which has caused the Petitioners to loose all sense of livelihood which was not through their own making, is there a right to justify and reverse the decision from the United States Court of Appeals for the Second Circuit?

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Petitioners, GEORGE C. S. LIU and GAIL K. LIU ("Lius"), respectfully request that a writ of certiorari be issued to review the summary order of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The summary order of the United States Court of Appeals for the Second Circuit is not published in the Federal Reporter (App. A). The summary order of the United States District Court for the Southern District of New York is not published in the Federal Reporter (App. B). The order of the Untied States Bankruptcy Court for the Southern District of New York is not published in the Federal Bankruptcy Reporter (App. C).

STATEMENT OF JURISDICTION

The summary order of the United States Court of Appeals for the Second Circuit ("Court of Appeals") was entered on December 21, 1998. A timely petition for rehearing was denied on January 22, 1999 (App. D).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

Federal Rule of Civil Procedure 60(b)(6) provides:

> (b) On motion and upon such terms as are just, the court may relieve a party or a party's legal

> representative from a final judgment, order or proceeding from the following reasons: . . . . (6) any other reason justifying relief from the operation of the judgment.

STATEMENT OF THE CASE

The fundamental question in this case is whether a litigant is entitled to relief from an order if the Bankruptcy Court Judge denied the litigant the right to proceed to trial in New York State Supreme Court. It arises in the context of the Lius' motion under Fed. R. Civ. P. 60(b)(6) ("Rule 60(b)(6) Motion") to reopen the order of the Court of Appeals which reaffirms the District Court's order upholding the Bankruptcy Court's order approving, pursuant to Federal Rule of Bankruptcy Procedure 9019, a $1.2 million settlement ($31 million in damages and two lives lost), for the benefit of the Petitioners' estate, of certain of Petitioners' pre-petition legal claims. To fully appreciate the significance of the issues presented in this case, it is important to consider the background of this case.

A. Background

In 1986, the Lius had located a building they wished to purchase that was located at 53-11 90th Street, Elmhurst, New York. They contacted Louis J. Macari, Esq., an attorney who had represented them for more than 18 years, to advise and help them in the purchase of said building. The Lius were told by Louis J. Macari, Esq. to obtain various income and expense information on that house and give it to Louis J. Macari, Esq. The Lius did obtain the information and did give it to Louis J. Macari, Esq.

A few days afterwards, Frank G. Messina, Esq., called the Lius and told the Lius that he was a partner of Louis J. Macari and that they were too busy to handle the purchase

of the building and advised the Lius to contact another attorney — Neil J. Weissman, Esq.

Mr. Weissman told the Lius that the building they were interested in was sold and recommended that they purchase another building called the Blair House which is located at 143-40 Roosevelt Avenue, Flushing, New York 11354. The Lius were told that the Blair House was already converted to a cooperative building. The building was owned by Joseph T. Macari, the brother of attorney Louis J. Macari. The purchase price was $4,750,000.

The Lius told Neil Weissman, Esq., that they did not know how to own or manage a cooperative building and did not have the funds to purchase the Blair House. Mr. Weissman lied and falsely represented the condition, status, and ability of the Lius.

After the closing in November 1986, the Lius learned that the first building they wished to purchase had not been sold and the Blair House was not a cooperative building that had been approved by the New York Attorney General.

The Lius were subsequently burdened with four (4) mortgages that they were unable to pay (three of which were held by Joseph T. Macari).

The Lius further learned that the contract of sale was altered without their knowledge after it was signed by them. The Lius were forced to make more than two million dollars in repairs to the property.

Needless to say, Joseph T. Macari started a foreclosure action. The Lius commenced an action in malpractice in New York State Supreme Court.

During the State Supreme Court action, the Lius discovered that their prior attorneys and Joseph T. Macari had, among other things, forged the mortgage acceptance letter, altered the Contract of Sale, concealed a judicial order, altered the terms of the real property deal, committed fraud, conspiracy, conflict of interest, and destroyed records and files.

In March 1994, the Lius, under the advice of Elliot M. Rudick, Esq., filed a petition for Bankruptcy Protection under Chapter 11. It was converted to Chapter 7 in June 1996.

The Trustee who was appointed in the Chapter 7 case, Kenneth P. Silverman, Esq., decided to continue with the services of Elliot M. Rudick, Esq., the attorney representing the Lius in the New York Supreme Court action.

At a future point in time, just three days before the State Supreme Court trial on April 10, 1997 the trustee recommend that the Supreme Court action be settled with the malpractice carriers for the sum of $1.2 million dollars and with Joseph T. Macari for the sum of $25,000. Mr. Rudick, Esq. agreed with the settlement because he was not prepared to try the case and he would get $400,000 from the settlement.

The action that was brought by Elliot M. Rudick, Esq. on behalf of the Lius in New York State Supreme Court was commenced in March 1992. The nature of the conduct of the attorneys and one of their brothers — Joseph T. Macari (a real estate broker and the mortgagee of the lawsuit) was in conspiracy, fraud, forgery, destroying documents and conflict of interest. Because Mr. Rudick was neither an experienced trial attorney, nor experienced litigator, the case languished in the State Court system for four years before the Lius Chapter 11 Bankruptcy (which was under Mr. Rudick's advice filed) was converted to Chapter 7. Had Mr. Rudick

brought the case to trial prior to the conversion, the Lius rights would have been determined by a jury, the Lius would have an opportunity to win sufficient sums of money to pay their debtors (IRS $45,000 and a second mortgagee of $400,000 which was taken away by Mr. Messina for the subject co-op fee) and to have money to sustain themselves. Instead, the State Supreme Court case was never tried, and by misleading and holding back the truth, Mr. Rudick, together with the Trustee conspired to settle the matter by accepting $1,200,000 from the malpractice insurance carrier for the attorneys (after despoiling the Petitioners all assets of an estimated $32 million), leaving the mastermind of the scam — Joseph T. Macari (the brother of Louis J. Macari) out of the damages who had defrauded the Lius in an extreme way.

After more than five years of litigation, Mr. Rudick was not prepared to try the State Supreme Court case. The Lius had paid Mr. Rudick a $50,000 retainer. Yet, the case was not ready for trial, even though Mr. Rudick had filed a Note of Issue (a form in New York State in which Mr. Rudick stated that all discovery is completed and the case is ready for trial).

At lease three attorneys and one of the attorneys brothers (Louis J. Macari, Frank G. Messina, Neil J. Weissman and Joseph T. Macari) had engaged in a conspiracy to defraud us, they had succeeded. Mr. Rudick and the Trustee had also conspired against us. The nature of the latter conspiracy is as follows: By not bringing the case to trial, Mr. Rudick and the Trustee assured themselves of large fees and also protecting the mastermind of the scam — Joseph T. Macari who is the main beneficiary of the entire fraud. If the case had gone to trial, Mr. Rudick stood the chance of having reduced his $400,000 fee, and the Trustee stood the chance of not receiving huge moneys.

There is no other reasonable explanation for not trying the *State Supreme Court case except that Mr. Rudick* was not competent to proceed and take the "shortcut". When he realized that the Trustee no longer had faith in him, the Trustee and Mr. Rudick agreed to settle the State Supreme Court case. Everyone benefits except the Lius. We have been literally raped by attorney after attorney.

The Lius had put their faith, trust and all evidencing documents into Mr. Rudick's hands. However, he had deceived us just as the attorneys subject to our lawsuit had deceived us.

By letter dated August 18, 1997, Jaspan Schlesinger Silverman & Hoffman LLP, the Chapter 7 Trustee's law firm, wrote to Chief Judge Tina L. Brozman, United States Bankruptcy Judge, Southern District of New York, that it had retained Mr. Rudick as Special Counsel to handle the State Supreme Court action that he informed the Trustee that he was not an experienced trial lawyer . . ." and ". . . the Trustee lacks confidence in Mr. Rudick's . . . ability to prosecute the State Court action to a successful conclusion . . .". It further stated that Mr. Rudick has never addressed the myriad legal issues and problems that plague the State Court action.

Mr. Rudick had repeatedly assured the Lius of his readiness and ability to pursue and try the case. Instead, Mr. Rudick took our $50,000 and retained an additional $400,000 by agreeing to settle the case. The Lius once again were deceived by an attorney. Everyone benefits — the defendants in the State Supreme Court action, Mr. Rudick, the Trustee and his law firm. The Lius walk away with nothing and were made homeless.

B. The Proceedings Below

After several hearings, United States Bankruptcy Judge for the Southern District of New York, Tina Brozman, on September 3, 1997, made a final order granting the Trustee's motion pursuant to Federal Rule of Bankruptcy Procedure 9019 to approve the $1.2 million settlement of the Lius pre-petition legal malpractice action for the benefit of their bankruptcy estate and its creditors.

The Lius appealed Judge Brozman's final order to the United States District Court of the Southern District of New York. United States District Court Judge Sidney H. Stein, on April 9, 1998, issued a final opinion and order affirming the decision of United States Bankruptcy Judge Tina L. Brozman.

The Lius appealed Judge Stein's order to the United States Court of Appeals for the Second Circuit. On December 21, 1998, the United States Court of Appeals for the Second Circuit issued a summary order adjudging and decreeing that the judgment of the District Court be affirmed.

REASON FOR GRANTING THE WRIT

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON THE IMPORTANCE OF RULE 60(b)(6) AS A MEANS OF EFFECTUATING DUE PROCESS RIGHTS.

The Lius' petition for writ of certiorari should be granted because a matter crucial to the cause of justice in this case, and the opinion below conflicts with this Court's prior rulings on the importance of Rule 60(b)(6) as a vehicle to correct violations of a party's due process rights.

In *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), this Court held that Rule 60(b)(6) may be used to reopen and vacate a final judgment. In holding that the use of Rule 60(b)(6) was appropriate, the court weighed "the risk of injustice to the parties . . . the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the publics confidence in the judicial process." *Id.* at 864.

The Lius were the object of massive fraud by attorneys and a brother of one of the attorneys. As a result of such fraud, the Lius are homeless and penniless. The only hope the Lius had to salvage any monies that they were defrauded of and to regain their dignity and self-worth was to proceed to a trial.

The Lius had a constitutional right to have their claims litigated in a fair and neutral forum. Either they were right or wrong. The New York State Supreme Court judge and jury should decide.

An indication of the strengthening of the Lius' case was made evident by the fact that the two malpractice carriers readily agreed to pay $1.2 million to settle the matter. Insurance companies are known to be very tight with their purse-strings. They would not have agreed to settle for $1.2 million unless they strongly believed that their insured would lose. Motions for summary judgments made by Defendants were denied.

Everybody involved with the litigation has won, except the Lius. The Defendant-attorneys do not have to pay any monies out of their pockets, Elliot M. Rudick, Esq. gets $400,000, plus prepaid a $50,000 retainer, the Trustee's lawyers (his own law firm) get their large legal fees paid, the insurance companies have limited their liabilities, and the Courts have removed a case that frees up the Courts' time.

The Lius, the only innocent people in this tragedy get nothing.

What happened to their right to a trial? Doesn't this great country owe its citizens a right to trial?

CONCLUSION

In order to prevent a travesty of justice from continuing, the summary order of the Court of Appeals for the Second Circuit must be overturned. The Lius should be permitted to exercise their due process constitutional rights to have a trial on the merits.

According, the Lius respectfully request that their petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED DECEMBER 21, 1998

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

* * *

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 21st day of December, one thousand nine hundred and ninety-eight.

Present: HONORABLE RALPH K. WINTER,
Chief Judge,
HONORABLE DENNIS JACOBS,
HONORABLE ROSEMARY S. POOLER,
Circuit Judges.

In re: GEORGE C. S. LIU and GAIL K. LIU,

Debtors.

No. 98-5027

GEORGE C. S. LIU and GAIL K. LIU,

Debtors-Appellants,

– v. –

Appendix A

KENNETH P. SILVERMAN, Esq., Chapter 7 Trustee of the Estate of George C. S. Liu and Gail K. Liu,

Trustee-Appellee.

* * *

Appeal from the United States District Court for the Southern District of New York (Stein, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court is AFFIRMED.

George C.S. Liu and Gail K. Liu appeal from Judge Stein's order affirming the bankruptcy court's order approving, pursuant to Federal Rule of Bankruptcy Procedure 9019, a $1.2 million settlement, for the benefit of appellants' estate, of certain of appellants' pre-petition legal claims. Appellants contend that the settlement significantly undervalues their claims and that the district court abused its discretion in approving it.

Rule 9019 permits the bankruptcy court, upon motion by the trustee, to approve a compromise or settlement. The court should do so where the proposed settlement is "both 'fair and equitable' and in the best interests of the estate." 10 Collier on Bankruptcy ¶ 9019.02 (15th ed. 1998) (Standards Governing Court Approval of a Compromise) (quoting *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968) ("TMT Trailer")). In making this determination, the court

should weigh the costs and benefits of settlement. *See TMT Trailer*, 390 U.S. at 424 (discussing factors to weigh).

We review a bankruptcy court's decision to approve a settlement extremely deferentially. That court's decision "should not be overturned unless its decision is manifestly erroneous and a clear abuse of discretion." *In re Purofied Down Prods. Corp.*, 150 B.R. 519, 522 (S.D.N.Y. 1993) (internal quotation marks omitted); *see also Anaconda-Ericsson, Inc. v. Hessen (In re Teltronics Servs., Inc.)*, 762 F.2d 185, 189 (2d Cir. 1985). Moreover, we need not conduct an independent investigation into the reasonableness of the settlement but must only "canvass the issues and see whether the settlement falls below the lowest point in the range of reasonableness." *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983) (internal quotation marks omitted).

The bankruptcy court approved the settlement at issue after two hearings in which it heard and considered all objections thereto and required additional explanation and documentation to be provided by the trustee. After considering all the factors, the bankruptcy court concluded that there were significant risks inherent in continuing to litigate the disputed claims and that the settlement was preferable under the circumstances.

The $1.2 million settlement approved by the bankruptcy judge is manifestly within the range of reasonableness. Appellants' own attorney estimated the reasonable value of their claims, if they prevailed, at about $3.5 million. That they would prevail, of course, is anything but certain, as is

the actual amount of damages they could expect in the event that they did prevail. Notably, the trustee and appellants' own attorney testified to the effect that appellants' underlying claims were internally inconsistent, meaning under the circumstances that they might not prevail against both defendants. Against such speculative benefits, the bankruptcy court weighed the value of a sure thing — $1.2 million — as well as the waiver of a cross-claim for $1.8 million filed against appellants and arising out of the same set of events upon which their claims were predicated. In light of the risks inherent in pursuing the underlying claims, the bankruptcy court's decision was well within its discretion. *See* 10 Collier on Bankruptcy at 9019.02 ("Where the evidence on the issue of a compromise is thorough and comprehensive, and the court is familiar with the entire record . . . the court's approval . . . does not constitute an abuse of discretion.").

The thrust of the oral argument was that the financial arrangements do not achieve justice in terms of what the Lius alleges to be misdeeds of their own counsel. If there was misfeasance by counsel — and we are in no position to consider the question — one proper forum is a complaint to the Departmental Disciplinary Committee, which can be contacted at (212) 685-1000.

We therefore affirm.

FOR THE COURT:
CAROLYN CLARK CAMPBELL, Clerk

s/ Lucille Carr — 12/21/98
By: — Date

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED APRIL 9, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

97 Civ. 7450 (SHS)

In re GEORGE C.S. LIU and GAIL K. LIU,

Debtors.

ORDER

SIDNEY H. STEIN, U.S. District Judge.

George C.S. Liu and Gail K. Liu, debtors, have appealed the bankruptcy court's approval of the bankruptcy trustee's settlement of claims by the estate against individuals who allegedly defrauded the debtors. A bankruptcy court's approval of a settlement "should not be overturned unless it is manifestly erroneous and a clear abuse of discretion." *In the Matter of 47-49 Charles Street, Inc.*, 209 B.R. 618, 620 (S.D.N.Y. 1997). The Bankruptcy Judge's approval of the trustee's settlement of the debtors' fraud and legal malpractice claims in state court, for $1.2 million, was not an abuse of discretion. Judge Brozman appropriately canvassed the issues and determined that the settlement does not "fall[] below the lowest point in the range of reasonableness." *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983) (citation omitted). Her approval of the settlement is supported by her conclusions regarding the risks of litigating the claims, as set forth on the record on August 19, 1997.

Appendix B

Accordingly, the order of the United States Bankruptcy Court for the Southern District of New York, dated September 3, 1997 (Brozman, U.S.B.J.), is hereby AFFIRMED.

Dated: New York, New York
April 9, 1998

SO ORDERED:

s/ Sidney H. Stein
Sidney H. Stein, U.S.D.J.

APPENDIX C — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK AT BOWLING GREEN APPROVING STIPULATION OF SETTLEMENT SETTLING THE TRUSTEE'S CLAIMS DATED SEPTEMBER 3, 1997

Jaspan Schlesinger Silverman & Hoffman LLP
300 Garden City Plaza
Garden City, New York 11530
(516) 746-8000
Anthony C. Acampora, Esq. (ACA#0838)
Shalini Vohra, Esq. (SV#1774)

Settlement Date: September 2, 1997
at 10:00 a.m.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
AT BOWLING GREEN

Chapter 7
Case No: 94B-40970 (TLB)

In re:

GEORGE C.S. LIU AND GAIL K. LIU,

Debtors.

ORDER APPROVING STIPULATION OF SETTLEMENT SETTLING THE TRUSTEE'S CLAIMS

Appendix C

Upon the motion (the "Motion") of Kenneth P. Silverman, Esq., the Chapter 7 Trustee (the "Trustee") of the estate of George C. S. Liu and Gail K. Liu (the "Debtors"), by his counsel, Jaspan Schlesinger Silverman & Hoffman LLP, seeking the entry of an order authorizing and approving the stipulation of settlement (the "Stipulation"), annexed hereto as Exhibit "A", settling the Trustee's claims in a state court action entitled "*Kenneth P. Silverman, Esq., as Chapter 7 Trustee of the estate of George C. S. Liu and Gail Kim Liu against Joseph T. Macari, Louis J. Macari, Frank A. Messina, Neil Weissman, Macari Messina & Ingber, a partnership, and Gould & Weissman, a partnership*", pending in the Supreme Court of New York, County of New York, and granting such other, further and different relief as this Court deems just and proper; and hearings having been held before this Court on July 31, 1997 and August 19, 1997 (the "Hearings"); and the Trustee, and his counsel, Jaspan Schlesinger Silverman & Hoffman LLP, having appeared on those days in support of the Motion; and upon the opposition being filed by the Debtors, by Bertram Brown, Esq. and Lawrence Fein, Esq., and upon the opposition being filed by Sivan Holding Co., which was withdrawn at the first hearing; and upon the record made on both days, the transcripts of which are incorporated by reference herein; and after due deliberation and consideration of all the facts and circumstances; and no additional notice being necessary or required, it is hereby

ORDERED, that the Stipulation be, and hereby is, approved in all respects; and, it is further

Appendix C

ORDERED, that the Trustee be, and hereby is, authorized to take such steps, execute such documents and expend such funds as may be reasonably necessary to effectuate this Order.

Dated: New York, New York
Sept. 3, 1997

s/ Tina L. Brozman
Honorable Tina L. Brozman
Chief United States Bankruptcy Judge

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JANUARY 22, 1999

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

CAROLYN CLARK CAMPBELL
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 22nd day of January one thousand nine hundred and ninety-nine.

Present:

Hon. Ralph K. Winter, Chief Judge,
Hon. Dennis Jacobs,
Hon. Rosemary S. Pooler,
CIRCUIT JUDGES,

Docket No. 98-5027

In Re: Gail K. Liu

A petition for rehearing having been filed herein by Appellants George C.S. Liu and Gail K. Liu,

Appendix D

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED.**

FOR THE COURT
CAROLYN CLARK CAMPBELL,
Clerk

By: s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney